No. 99-859

IN THE

# Supreme Court of the United States

Central Green Co.,
*Petitioner,*

v.

United States of America,
*Respondent.*

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## BRIEF FOR THE PETITIONER


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## QUESTION PRESENTED

Petitioner brought this suit against Respondent United States because Petitioner's property has been damaged by *irrigation waters* leaking from a federal *irrigation canal*. Respondent argued that the suit was barred by 33 U.S.C. § 702c, which immunizes the federal government from liability for damage caused by "floods or flood waters." The district court and Ninth Circuit agreed, holding that the waters were "flood waters" as a matter of law under its settled precedent. But the court of appeals acknowledged that its decision likely could not be reconciled with this Court's holding in *United States* v. *James*, 478 U.S. 597, 605 (1986), that "flood waters" include only those waters carried in "a flood control project for purposes of or related to flood control."

The Question Presented is:

Whether 33 U.S.C. § 702c renders Respondent immune from Petitioner's suit as a matter of law.

## PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the Madera Irrigation District was a party to the proceedings below.

Petitioner Central Green Company is a limited partnership with no parent corporations or publicly held companies owning 10% or more of Petitioner's stock.

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## BRIEF FOR THE PETITIONER

## OPINIONS BELOW

The district court's opinion dismissing the complaint as to Respondent is reprinted in the appendix to the Petition for a Writ of Certiorari ("Cert. App.") at 10a-20a. The court of appeals' opinion affirming the district court's judgment is reported at 177 F.3d 834 and reprinted at Cert. App. 1a-9a. The court of appeals' order denying rehearing and rehearing en banc is reprinted at Cert. App. 21a.

## JURISDICTION

The court of appeals entered its order denying rehearing and rehearing en banc on September 7, 1999. Petitioner filed a Petition for a Writ of Certiorari on November 19, 1999, which this Court granted on March 20, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The immunity provision of the Flood Control Act of 1928, 33 U.S.C. § 702c, provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

## STATEMENT

This case involves the scope of the federal government's immunity from suit under a section of the Flood Control Act of 1928 ("the Act" or "the Flood Control Act") providing that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c ("Section 702c"). This suit arises from damage caused by irrigation waters leaking onto Petitioner's property from a federal irrigation canal. The panel of the Ninth Circuit that heard this case recognized that, because the canal "is not a flood control project and serves no

flood control purpose," Cert. App. 9a, Respondent should *not* be entitled to immunity under this Court's holding in *United States* v. *James* that Section 702c applies only to waters "contained in or carried through a federal flood control project for purposes of or related to flood control." 478 U.S. 597, 605 (1986). The panel nonetheless found itself bound to find Respondent immune based on longstanding Ninth Circuit precedent holding that Section 702c applies to *any* water carried for *any* purpose in *any* facility that is even nominally *part* of a larger federal water project that has flood control as *one* of its purposes. Other circuits have rejected the Ninth Circuit's standard because it conflicts with *James*, "makes little sense in light of the text and purposes of the Act," and extends well beyond where "Congress intended to stretch the shield of flood control immunity." *Cantrell* v. *United States*, 89 F.3d 268, 271 (CA6 1996); *Boyd* v. *United States*, 881 F.2d 895, 900 (CA10 1989). Expressly recognizing this compelling, contrary authority, the panel invited this Court to grant certiorari to review its decision. Cert. App. 9a.

1. Petitioner owns a pistachio farm in California's San Joaquin Valley. The farm is traversed by the Madera Canal ("the Canal"), which is an irrigation canal that carries irrigation water through the Valley (although not to Petitioner's farm). This suit arises because the Canal leaks, raising the water table and damaging Petitioner's farm.

Petitioner, seeking to have the Canal repaired and to be compensated for the damage it had incurred, sued Respondent United States (which designed, constructed, and owns the Canal) under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, as well as the Madera Irrigation District (which operates the Canal under contract to the federal government). According to the complaint, the Canal "is used to convey irrigation water to various lands in the San Joaquin Valley." Joint Appendix ("J.A.") 8, ¶ 7; see also *id.* at 7, ¶ 2 (canals operated by Respondent are "used for delivery of irrigation water to farmers"). Petitioner asserted that the defen-

dants' conduct constituted a nuisance, trespass, and the creation of a dangerous condition to real property. See J.A. 10-13.

After filing its answer and before any factual development in the case, Respondent moved for judgment on the pleadings on the basis of Section 702c. Respondent accepted for purposes of its motion that the complaint's "factual allegations [were] true," including specifically that the Canal "is used to convey irrigation water." Resp. Mo. for J. on Pleadings 2, ¶ 3, *reprinted in* Ct. of App. Excerpts of Rec. ("C.A. E.R.") 139. Respondent noted, however, that the Madera Canal is part of the "Friant Division" of a massive federal water project known as the Central Valley Project ("CVP"). Specifically, the Canal transports water from Millerton Lake, a reservoir created by Friant Dam, which is one of more than 20 dams in the CVP.

Respondent relied on longstanding Ninth Circuit precedent holding that "flood waters" include all waters "not wholly unrelated" to a flood control *project*, even if "devoted solely to irrigation purposes." *Id.* at 7 (citing *Washington* v. *East Columbia Basin Irrig. Dist.*, 105 F.3d 517 (CA9), *cert. denied*, 552 U.S. 948 (1997); *McCarthy* v. *United States*, 850 F.2d 558, 562 (CA9 1988), *cert. denied*, 489 U.S. 1052 (1989); *Morici Corp.* v. *United States*, 681 F.2d 645, 647 (CA9 1982)). Those precedents furthermore deem each and every component of multi-purpose, multi-facility water projects such as the CVP to be a "flood control project," relying on congressional statements that the projects' authorized purposes include "flood control" and the government's assertion that the projects operate as an "integrated whole." *Id.* at 9. Thus, *solely* because Madera Canal is nominally part of the CVP, Respondent asserted that, under Ninth Circuit precedent, all of the water in the Canal is "flood water."

2. The district court granted Respondent's motion for judgment on the pleadings and the Ninth Circuit affirmed, although it expressed grave doubts that its holding comported

with this Court's decision in *United States* v. *James*, 478 U.S. 597 (1986).[1] According to *James*, the Flood Control Act

> concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c's plain language that the terms "floods" and "flood waters" apply to all waters contained in or carried through a federal flood control project *for purposes of or related to flood control*, as well as waters that such projects cannot control.

*Id.* at 605 (emphasis added). The Ninth Circuit recognized that "[t]he Madera Canal disburses irrigation water throughout the San Joaquin Valley." Cert. App. 9a. Moreover, "flood control is not one of the stated purposes of the Madera Canal." *Id.* at 8a. Thus, "[t]he canal is *not* a flood control project and serves *no* flood control purpose" and "the water in the Madera Canal was *not* held for the purpose of flood control." *Id.* at 8a-9a (emphasis added).

The court of appeals nonetheless found itself bound by settled Ninth Circuit precedent to hold the government immune from Petitioner's suit because the water in question was "not wholly unrelated" to the Madera Canal. The Canal, in turn, is a "flood control project" under Ninth Circuit precedent because it is nominally part of the CVP, which in turn "has flood control as one of its congressionally authorized purposes." Cert. App. 2a. Under these precedents, "[t]here does not appear to be any set of facts where the government is not immune from damage arising from water that at one time passed through part of the Central Valley or other flood control project." *Id.* at 9a.

The court of appeals frankly acknowledged that Ninth Circuit precedents "seem to delete" a critical element of this

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[1] See Cert. App. 10a-20a (district court opinion); J.A. 5 ¶ 28 (noting entry of judgment under FRCP 54(b)); Cert. App. 1a-9a (court of appeals opinion).

Court's holding in *James*: that immunity applies only if the waters are carried "for purposes of or related to flood control." Cert. App. 7a. It further acknowledged that several other circuits "have found [the Ninth Circuit's] standard to be too broad and require a more *substantial nexus* between flood control activities and the damage incurred." *Id.* at 4a (emphasis added). The panel accordingly invited this Court to review this case. *Id.* at 9a. After the Ninth Circuit denied rehearing en banc, *id.* at 21a, this Court granted certiorari.

## SUMMARY OF THE ARGUMENT

The Ninth Circuit's holding that Section 702c renders Respondent immune from Petitioner's suit conflicts with both aspects of the definition of "flood waters" announced by this Court in *James*: the waters in this case were neither "contained in or carried through a flood control project" nor so-carried "for purposes of or related to flood control." 478 U.S. at 605. First, as the panel below recognized, the Ninth Circuit's definition of "flood waters" as including all waters in a flood control project without regard to whether those waters served a flood control function "deletes" *James*' requirement that the waters be carried "for purposes of or related to flood control." In this case, the waters do not satisfy the test announced in *James*, because the Madera Canal "serves no flood control function." *Id.* 9a. Instead, the Canal is an irrigation project that has as its exclusive purpose the delivery of irrigation water. Indeed, this inconsistency with *James* is confirmed by numerous sources: provisions of the Flood Control Act expressly distinguishing "flood waters" from waters diverted to other beneficial uses such as irrigation; a federal statute (33 U.S.C. § 709), regulation, and water control agreement that distinguish the flood control operation of Friant Dam from diversions for irrigation purposes; the fact that Respondent recoups the costs of irrigation uses through charges to irrigation users; and Respondent's repeated recognition that the Madera Canal is an "irrigation facility" carrying "irrigation water" rather than "flood waters."

Second, the waters in this case were not "carried in a flood control project" as *James* requires. This Court squarely held in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), that Friant Dam is a "reclamation project" rather than a "flood control project." The same is true of the Madera Canal. Both the Dam and the Canal were funded under the reclamation laws, not statutes governing the construction of flood control projects, such as the Flood Control Act of 1928. Indeed, the legislative history of the 1928 Act makes very clear that Congress did not intend the Act's provisions to apply to reclamation developments.

Given the clear conflicts between the Ninth Circuit's holding in this case and *James*, the judgment should be reversed on the ground that Respondent is not entitled to immunity under Section 702c. Alternatively, if some doubts remain regarding whether Petitioner was damaged by "flood waters," the case should be remanded. The district court dismissed the complaint on the pleadings without giving Petitioner any opportunity to develop and prove facts that would have shown that the waters were not "contained in or carried through a flood control project for purposes of or related to flood control." Thus, to the extent that Respondent advances arguments that the waters in the Canal as a factual matter serve a substantial flood control function, such claims should be resolved on remand rather than in this Court in the first instance.

## ARGUMENT

### I. Section 702c Applies Only To Waters Carried Primarily For Flood Control Purposes, Not To All Waters Carried In A Flood Control Project

The Ninth Circuit erroneously held that Respondent is immune in this case because Petitioner was damaged by waters that were carried in a flood control *project*, notwithstanding that those waters served absolutely no flood control *function*. The Ninth Circuit's ruling conflicts not only with

*James*, as the panel itself recognized, *id.* at 7a, but also with the Flood Control Act's text and legislative history, as well as Congress' intent in enacting the Federal Tort Claims Act. Properly construed, Section 702c applies only to waters that primarily serve the purpose of flood control. Although some circuits apply Section 702c to waters that are "not wholly unrelated" to flood control activities, they do not generally read that test to extend to waters only incidentally related to flood control.

Respondent in two briefs filed in opposition to certiorari in this case did not seriously attempt to defend the Ninth Circuit's standard and, indeed, seemed to agree that immunity applies only to waters that have at least a substantial nexus to flood control efforts. Thus, the brief in opposition surveys the circuit authority and asserts with approval that, in cases "involving injuries more remotely related to federal flood control efforts, [the courts of appeals] have held the government subject to suit." BIO 12-13 & n.5; see also Cert. App. 4a (noting that several circuits require a "substantial nexus" to flood control efforts). Among the decisions cited by Respondent is *Henderson* v. *United States*, 965 F.2d 1488 (1992), in which the Eighth Circuit rejected the government's assertion that it was immune for injuries caused by a water release that unquestionably reduced the water level of a flood control lake. The court applied its substantial-factor test by determining the "primary purpose" served by the waters in question. Specifically, it held that the government was not immune because "the primary purpose behind operating the dam is generating electric power" and the release in question was ordered "with the commercial purpose of generating power." 965 F.2d at 1492. For the reasons we explain below, this inquiry into whether waters have a substantial nexus to flood control, as determined by the "primary purpose" served by the waters, is the correct reading of Section 702c.

Ultimately, however, the particular formulation used to apply Section 702c makes no difference in this case because

the waters that damaged Petitioner cannot possibly be deemed "flood waters" under any standard that requires anything more than the most extraordinarily attenuated relationship to flood control activities. A large proportion of the waters that damaged Petitioner were not "flood waters" even when originally stored behind Friant Dam, given that (a) there is absolutely no risk of floods on the San Joaquin River for much of the year, and (b) throughout the year, the great majority of the water stored behind the Dam simply constitutes the river's normal flow (rather than water that would have overridden the river's banks) and is retained only for irrigation, not to control floods. To the extent that these waters sometimes fill Millerton Lake to capacity, that is only because Respondent stores them for irrigation rather than allowing them to pass into the river bed below the Dam. Furthermore, water is diverted into the Madera Canal solely for irrigation pursuant to regulations that distinguish irrigation releases from flood control releases. Finally, the Canal is a separately designated "irrigation facility" and Respondent recoups all of its costs relating to distribution of the water from irrigation users. Indeed, Respondent consistently refers to the water in the Canal as "*irrigation water*," not "flood waters."

A. This Court's Decision In *James*

Congress enacted the Flood Control Act of 1928 in response to the great Mississippi River flood of 1927, which resulted in more than 200 deaths, left almost 700,000 people homeless, and caused more than $200 million in property damage. Congress deemed previous efforts to control flooding in the region through the use of levees a failure. The Act thus called on the Army Corps of Engineers to implement "a comprehensive ten-year program for the entire [Mississippi] valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds." *United States* v. *Sponenbarger*, 308 U.S. 256, 262 (1939); see also *Hurley* v. *Kincaid*, 285 U.S. 95, 99 (1932). In order to avoid exposing the federal gov-

ernment to liability for its flood control efforts in the Mississippi River Valley, Congress provided that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," 33 U.S.C. § 702c.

This Court interpreted Section 702c in *United States* v. *James*, 478 U.S. 597 (1986), a consolidated case which arose when government employees negligently opened locks at two federal flood control projects (a flood control dam and a flood control drainage structure), causing recreational boaters to be swept away to their deaths. The district courts held that, although the government had failed to provide sufficient warning before releasing the water, it was nonetheless immune under Section 702c because the deaths had resulted from "flood waters." Specifically, the dam and drainage structure were federal "flood control" facilities and the government had released the water in order to reduce the reservoirs from flood stage. This Court rejected the plaintiffs' argument that the Act does not apply to "the negligent or wrongful acts of government employees," explaining that Section 702c's reference to "any damage from or by floods or flood waters at any place" is "sweeping." 478 U.S. at 603-04 (citation and quotation marks omitted).

*James* took care to explain, however, that the Flood Control Act's reference to "floods or flood waters" limits the scope of the government's immunity. According to the Court, "flood waters" are those with a direct nexus to flood control efforts:

> The Act concerns flood control projects designed to control flood waters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project *for purposes of or related to flood control*, as well as to waters that such projects cannot control.

*James*, 478 U.S. at 605 (emphasis added). In an accompanying footnote, the Court noted that some circuits confer immunity for damages caused by waters "not wholly unrelated" to flood control activities, but it did not endorse that test. Accord *Fryman* v. *United States*, 901 F.2d 79, 82 (CA7 1990) (per Easterbrook, J.) (explaining that, although *James* noted the "not wholly unrelated" standard, it "did not adopt the 'wholly unrelated'" test).

This Court's decision in *James* is flatly inconsistent with the Ninth Circuit's reading of Section 702c. *James* limits "flood waters" to those carried "for purposes of or related to flood control." In point of fact, the Solicitor General had broadly asserted in his brief in *James* that immunity applies to all waters in any flood control project, even if those waters were not related to the purpose of flood control, arguing that Section 702c encompasses "*all* waters contained in or carried through such structures as well as waters the structures could not retain." Br. for U.S., No. 95-434, *United States* v. *James* 17 (emphasis added). But this Court declined to adopt such an expansive reading of "flood waters," a point not lost on the panel below, which expressly recognized that Ninth Circuit precedents "seem to delete" *James*' requirement of a direct nexus to flood control efforts. Cert. App. 4a.

Furthermore, although *James* did not resolve precisely what degree of "relationship" to flood control activities is sufficient to confer immunity under Section 702c, the Court's opinion does strongly suggest that a substantial relationship is required. The Court emphasized that the waters in question were directly related to flood control activities, explaining that the government was entitled to immunity because "the District Court in each case found that the waters were being released from federal flood control facilities *to prevent flooding*." 478 U.S. at 605 n.7 (emphasis added). The Court made the same point when it rejected the plaintiffs' claim that "their injuries arose from Government employees' alleged mismanagement of recreational activities" on the ground that

"the release of the waters * * * was *clearly related to flood control*." *Id.* at 609-10 (emphasis added).

B. The Text And Legislative History Of The Flood Control Act

1. The text of the Flood Control Act similarly demonstrates that Respondent's immunity extends only to waters carried principally for the purpose of flood control. The Ninth Circuit held that Respondent is immune for damage caused by all waters in a flood control project notwithstanding that its definition of a "flood control project" encompasses all facilities that are nominally *part* of a larger project that has "flood control" as *one* of its authorized purposes – including facilities that (like the Madera Canal here) are not even authorized for flood control uses and that do not provide flood control benefits – and therefore sweeps in all manner of waters that have no relationship to flood control efforts. That holding cannot be reconciled with the plain text of Section 702c.

Congress only provided that the government would be immune for damage caused by "floods" and "flood waters." It could have enacted a broader immunity provision – one that applied, for example, to "all activities related to a federal flood control project," "all waters in a federal flood control project," or "all waters that pass through a federal flood control project" – but it did not. And, plainly, that choice was a conscious one: numerous provisions of the Act show that Congress was well aware of the difference between "floods" and "flood waters," on the one hand, and "flood control facilities" and "flood control works," on the other.[2] Accord Br.

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[2] See 33 U.S.C. § 702c (discussing "floods" and "flood waters" separately from "flood-control works" such as "spillway structures, including special relief levees"); *id.* § 702 (discussing "flood waters" separately from "levees constructed for flood control"); *id.* § 702b (discussing "floods" and "flood waters" separately from "flood control work"); *id.* § 702d (discussing "flood waters"

of U.S., No. 86-939, *ETSI Pipeline Project* v. *Missouri* 33 n.50 (explaining that, with respect to Flood Control Act of 1944, "when Congress wished to describe particular physical works * * * it specifically used the word 'works'").

Indeed, another section of the Act *does* immunize the government for damages caused by a specific project, a provision that demonstrates that Congress was fully capable of immunizing the government for all damages relating to flood control facilities and that, indeed, would seem to be superfluous under the reading that the Ninth Circuit and Respondent attribute to Section 702c. See 33 U.S.C. § 702j-2 (requiring that local authorities "hold and save the United States free from liability for damages on account of the use of said area [the White River Levee District] for reservoir purposes during said emergency").

Not only did Congress not provide that the government would be immunized for all of the activities of a flood control project, but it also did not extend Section 702 to all "waters." Instead, Congress consciously used the more limited term "*flood* waters," which, although not defined in the Act, has the plain meaning of "the water of a flood." Webster's Third Int'l Dictionary 873 (1981). To be sure, under an extraordinarily expansive, almost metaphysical definition, all water is "flood water" because all water was at some point in history part of a flood before being recycled into the environment. Thus, the water in the CVP may be contained to prevent a flood, then be distributed for irrigation, then evaporate, then fall as rain water, and then be consumed by humans. But at some point, it must lose its character as "flood water" and be-

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separately from "works of flood control"); *id.* § 702g (discussing damage caused "by flood" separately from "maintenance of any flood-control work"); see also *infra* at 16-19 (discussing proposed provision of Federal Tort Claims Act, not enacted by Congress, that would have granted government immunity for all damages caused by flood control projects).

come, in the commonly understood sense, "irrigation water," "rain water," and later "drinking water." If Congress intended to extend Section 702c more broadly than the waters of a flood, it could have and would have used a broader term.

There certainly is no support in the text or the legislative history of the Flood Control Act for the proposition that water stored primarily for irrigation and then diverted for irrigation is "flood water." Numerous provisions of the Act refer to "flood waters," but only in the sense of waters overflowing the bed of a river or held behind levees, as opposed to water put to some other beneficial use. See *supra* at n.2 (citing provisions of the Act referencing "flood waters"). The same is true of the numerous references to "flood waters" in the congressional debates over the Flood Control Act.[3] Furthermore, the Act expressly adopts a report prepared by the Army Corps of Engineers in response to the great flood of 1927, see 33 U.S.C. § 702a, which uses the phrase "flood waters" repeatedly, but never in the context of water diverted for some other beneficial purpose. Indeed, the report expressly distinguishes between the use of reservoirs on the Mississippi for "flood control" and their use "*primarily*" for other purposes. H. Doc. No. 90, Flood Control in the Mississippi Valley 21 (1927) (contrasting use of 203 headwater reservoirs "primarily for Mississippi River control" versus "primarily for other

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[3] E.g., 69 Cong. Rec. 6643 (Apr. 17, 1928) (statement of Rep. Reid) (describing the "flood waters" held behind levees during 1927 flood); *id.* at 6649 (statement of Rep. Driver) (explaining, as accepted premise of flood control efforts, that "floodwaters" must be confined within the river channel); *id.* at 6707 (Apr. 18, 1928) (statement of Rep. Gregory) (describing "flood waters" that inundated Columbus, Ky., in 1927 flood); *id.* at 7023 (Apr. 23, 1928) (statement of Rep. Cox) (in discussion of Section 702c, describing "flood waters" that would overflow lands in floodways); *id.* at 8192 (May 9, 1928) (expressing the view that "we ought not to confuse this project, dealing with the flood waters of the Mississippi River, with the sources of streams and irrigation projects").

purposes, such as power, local flood control, irrigation, etc."); *id.* at 23 ("In summary, the best system of reservoirs that has been found will cost about $240,000,000. When operated primarily for the purpose of flood control on the Mississippi it would not reduce the maximum predicted flood to a discharge which could safely be passed by the present levees.").[4]

2. A separate provision of the Act, 33 U.S.C. § 702j ("Section 702j") – which was enacted contemporaneously with, and is expressly incorporated by, Section 702c – also makes clear that Congress did not regard waters stored and then diverted for some beneficial purpose other than flood control to be "flood waters" for which the government is immune. Section 702j directs the Army Corps of Engineers to study the possible construction of reservoirs on tributaries of the Mississippi River, including particularly the beneficial uses for which water stored in the reservoirs might be used. Importantly, the provision refers to the water as "flood waters" when first contained but "reservoired waters" when put to some other use, such as irrigation. Section 702j thus directs the Secretary of War to submit to Congress a report regarding

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[4] See also, e.g., H. Doc. No. 90, Flood Control in the Mississippi Valley 3 (1927) ("The recommended plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity and sends the surplus water through lateral floodways."); *id.* at 4 ("The plan heretofore pursued has been the construction of levees high enough and strong enough to confine all of the flood waters within the river channels."); *id.* at 6 ("To prevent flood waters from entering the Tensas Basin, except into the flood way during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary."); *id.* at 14 ("The river, in low water and in all stages up to bankful, should be carried in the main channel until we reach the flat land bordering the Gulf of Mexico. All the flood water can not be carried in this one channel.").

> the effect on the subject of further flood control of the lower Mississippi River to be attained through the control of the *flood waters* in the drainage basins of the tributaries by the establishment of a reservoir system; the benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream; a determination of the capacity of the soils of the district to hold *waters from such reservoirs*; the prospective income from the disposal of *reservoired waters*; the extent to which *reservoired waters* may be made available for public and private uses; and inquiry as to the return flow of waters placed in the soils from reservoirs, and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation * * * .

33 U.S.C. § 702j (emphases added).

The legislative history of Section 702j confirms that Congress did not regard waters stored and then diverted for beneficial purposes such as irrigation as "flood waters." Members of Congress, in discussing the provision, distinguished "flood control" from the other beneficial purposes for which water would be used. E.g., 69 Cong. Rec. 5488 (Mar. 28, 1928) (statement of Sen. Jones) (distinguishing study of "flood control" from "reclamation, water power and navigation"); *id.* at 6771 (Apr. 19, 1928) (statement of Rep. Spears) (distinguishing study of "flood control" from "navigation benefits, agricultural use, and power"). Indeed, they described the reservoirs as "*changing*" the "flood waters" into "water for navigation," *id.* at 7007 (Apr. 23, 1928) (statement of Rep. Simmons) (emphasis added), and creating "water for irrigation," *id.* at 7127 (Apr. 24, 1928) (statement of Rep. Cartwright); *id.* ("Proper flood control, proper water storage, and proper distribution of this stored water will mean bumper crops every

year for every section of the Nation.").[5] Thus, not only did Congress not use the term "flood waters" to describe waters stored and then diverted for some other beneficial purpose, but it also manifestly did not enact an immunity provision encompassing those other uses of water. As a result, even if the waters in the Madera Canal could be said to have once been "flood waters," they plainly lost that character for purposes of Section 702c once retained and diverted principally for the purpose of irrigation.

C. The Federal Tort Claims Act

The Ninth Circuit's construction of Section 702c also cannot be reconciled with Congress' intent in enacting the statute under which Petitioner's suit arises: the Federal Tort Claims Act ("FTCA"). The FTCA grants federal courts jurisdiction over "claims against the United States * * * under circumstances where the United States, if a private person, would be liable to the claimant," 28 U.S.C. § 1346(b), and (with certain exceptions) waives the federal government's sovereign immunity from "tort claims, in the same manner and to the same extent as a private individual under like circumstances," *id.* § 2674. Written in "neither intricate nor restrictive language in waiving the Government's sovereign immunity," *United States* v. *Muniz*, 374 U.S. 150, 152 (1963), the FTCA is designed to encourage government agents to exercise due care and to ensure that injured private parties such as Petitioner will not bear the cost of the government's negligence. Prior to enactment of the FTCA, "[a]s the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs – wrongs which would

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[5] See also 69 Cong. Rec. 7119 (Apr. 24, 1928) (statement of Rep. Swank) ("impounded waters" to be placed under the control of the Secretary of the Interior); *id.* at 8188 (May 9, 1928) (statement of Sen. King) (discussing policy of "conserving waters by other means and of utilizing and distributing them for power and irrigation and other purposes").

have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government." *Feres* v. *United States*, 340 U.S. 135, 139-40 (1950). To expand the government's immunity to encompass damages caused by waters that have only an incidental relationship to flood control would contravene Congress' intent by at least countenancing, if not encouraging, governmental negligence (indeed, gross negligence) in controlling those waters and by imposing on innocent parties such as Petitioner the costs of activities that are not directly related to flood control.

Of particular note, Congress repeatedly considered but did not enact exceptions that would have rendered the government immune for all damages caused by the operation of "flood control" and "irrigation" projects. E.g., H.R. 9285, 70th Cong., 1st Sess. § 8(a)(6) (1928); S. 4567, 72d Cong., 1st Sess. § 206(6) (1932); H.R. 17168, 71st Cong., 3d Sess. § 3(a)(6) (1931). This Court has squarely held that Congress' decision not to adopt such exceptions – *including particularly the exceptions for irrigation and flood control projects* – was "a deliberate choice, rather than an inadvertent omission," and that, accordingly, claims that would have been excluded under the exceptions can go forward under the Act. *United States* v. *Muniz*, 374 U.S. 150, 156 & n.9 (1963). The Court made essentially the same point in an earlier case addressing the discretionary function exemption, which was included in the FTCA as finally enacted. In *Dalehite* v. *United States*, 346 U.S. 15 (1953), the Court gave great weight to an excerpt from the legislative history that "appear[ed] time and again" after being endorsed by the Department of Justice:

> This paragraph characterizes the general exemption [for discretionary functions] as "a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, *such as a flood-control or irrigation project,*

> *where no negligence on the part of any Government agent is shown*, and the only ground for suit is the contention that the same conduct by a private individual would be tortious."

346 U.S. at 28 (emphasis added). In dissent, Justice Jackson would have taken an even narrower view of the discretionary function exception, 346 U.S. at 58 n.12, and thus every member of the Court agreed that when activities regarding "a flood control or irrigation project" were not discretionary and did involve "negligence on the part of [a] Government agent," the plaintiff *could* bring suit under the FTCA. See also *Berkovitz* v. *United States*, 486 U.S. 531, 537 (1988) (citing *Dalehite* as holding that the discretionary function exception "protects only governmental actions and decisions based on considerations of public policy").

Congress thus did not intend to immunize the government for its negligent operation of flood control projects unless the requirements of the "discretionary function" exception were satisfied. But that is precisely the effect of the standard applied by the Ninth Circuit, which accords the government immunity for all water carried in a flood control project without regard to whether the water directly serves a flood control function. Properly construed, to the extent Petitioner was damaged by waters not carried for the purpose of flood control, the FTCA permits Respondent to defend against Petitioner's suit by establishing (a) that the acts alleged by the complaint fall within the Act's "discretionary function" exception, and/or (b) that the government was not negligent. Not surprisingly, Respondent's answer to the complaint in this case raised both of those defenses, see J.A. 57-61, which must be resolved on remand.

### D. Section 702c Applies To Waters Carried "Primarily For Flood Control"

For the reasons explained above, the government is immune under Section 702c only for damage caused by waters

that have at least a substantial nexus to flood control activities. The relevant sources – this Court's decision in *James*, the text and legislative history of the Flood Control Act, and the text and legislative history of the Federal Tort Claims Act – are inconsistent with an exceedingly expansive definition of "flood waters," such as "waters that are literally 'not wholly unrelated' to flood control efforts." On the other hand, it is apparent that water need not be used *exclusively* for flood control for Section 702c to apply: *James* indicates that the statute encompasses waters originally stored and later diverted for purposes of flood control notwithstanding that in the interim they may have provided incidental benefits, including recreational activities such as boating.

Numerous formulations exist between those two extremes, none of which would entitle Respondent to immunity in this case, given that the irrigation water leaking from the Madera Canal has at most an exceedingly attenuated relationship to flood control activities. But if the Court elects to use this case as a vehicle to adopt a particular test, we suggest that for three reasons the proper inquiry is into whether the waters were carried in a flood control project "primarily for the purpose of flood control."

First, an inquiry into the "primary" purpose served by the waters is most consistent with Congress' intent. The text of Section 702c makes plain that Congress was principally concerned with the government's liability for naturally occurring floods and the waters that would constitute floods, as when a flood control project is used to store flood waters but is overrun and damage results downstream. An inquiry into the "primary" purpose served by waters ensures that immunity applies in such cases, even though the water may also be used for some incidental benefit such as recreation.

But the "primary purpose" standard also guards against extending the government's immunity too far, including particularly to include waters that have relatively incidental flood control benefits never considered by Congress in enacting the

Flood Control Act. Virtually every diversion of water in a federal flood control project will, by definition, have the incidental effect of reducing water levels *somewhere*, thereby potentially reducing the risk of floods. The CVP, for example, not only irrigates several million acres of land, but it also provides water for "power development, domestic and industrial consumption, navigation, waste disposal, control of salinity, enhancement of fish and wild life, [and] beautifying the out-of-doors," all of which are included in its authorized purposes. Erwin Cooper, Aqueduct Empire: A Guide to Water in California, Its Turbulent History, and Its Management Today 153, 166 (1968) (hereinafter "Cooper, Aqueduct Empire"); Central Valley Improvement Act, 102 Pub. L. 575, § 3402, 106 Stat. 4600 (1992). Friant Dam alone diverts 95% of the San Joaquin River's flow not only to irrigate approximately 1 million acres of land but also to provide a water supply for 320,000 individuals, to drive hydroelectric generators, and to maintain a trout fishery. S. Comm. on Energy and Nat. Resources, Hearings on S. 484, Central Valley Improvement Act, 102d Cong., 1st Sess. 68, 75 (1991) (Statement of Richard M. Moss, General Manager, Friant Water Users Auth.); Federal Energy Regulatory Comm'n, Office of Hydropower Licensing, Water Resources Appraisal for Hydroelectric Licensing: Middle San Joaquin Valley Basin 30, 32 (1984) (hereinafter "FERC, San Joaquin Report").[6]

On an expansive definition of "flood waters," all of these diversions would arguably trigger the government's immunity under Section 702c. As a result, innocent third parties would

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[6] See also Congressional Budget Office, Water Use Conflicts in the West: Implications of Reforming the Bureau of Reclamation's Water Supply Policies 28 (1997) (explaining that the CVP is "the largest, most ambitious water project in the country" with "20 dams and more than 500 miles of major canals"); U.S. Dep't of Interior, An Appraisal of Total Water Management in the Central Valley Basin, California 14 (rev. ed. 1974); U.S. Dep't of Interior, Central Valley Water Resource Study 6, 11 (1970).

be effectively required to subsidize the government's operation of water projects for purposes other than flood control through absorbing the costs of the government's negligence. Under the lower courts' judgment in this case, for example, Petitioner Central Green would be required to absorb costs arising from the operation of the Madera Canal (the damage to its farm caused by leaking water) that otherwise would be corrected by the federal government, which would in turn pass the costs of repairs on to the farmers who have contracted to receive water from the Canal. It seems exceedingly unlikely that Congress intended Section 702c to reach so broadly given that, as we explained above, the Flood Control Act does not use the term "flood waters" to encompass waters diverted primarily for other beneficial uses, see *supra* at 14-16 (discussing 33 U.S.C. § 702j), and Congress intended that the government would be liable for its negligence in operating flood control and irrigation facilities, see *supra* at 16-18.

Second, an inquiry into the "primary purpose" served by waters is the appropriate test under Section 702c because it has the advantage of ease of administration. As just noted, water is diverted from dams and reservoirs for all manner of activities. If Section 702c is held to confer immunity even for waters that have a relatively attenuated relationship to flood control, the lower courts will find themselves embroiled in indeterminate disputes about the degree to which those activities consume waters originally held in reservoirs to prevent flooding and therefore incidentally reduce the risk of floods. By contrast, an inquiry into the "primary purpose" served by waters, which is a standard of proof familiar to the lower courts from all manner of other contexts, presents a clear and determinate test that focuses the inquiry where it belongs: on whether the specific waters in question presented the risk of damage that Congress sought to avoid in enacting Section 702c.

Third, an inquiry into the "primary purpose" served by waters avoids interfering with the normal operation of other

provisions of federal law, which also turn on the presence of "flood waters." An expansive reading of "flood waters" in Section 702c presumably would apply to these other provisions as well, altering the operation of a variety of water-related programs and producing nonsensical results. A few examples illustrate this point. Under federal law, if "an agricultural structure" is repaired "to provide resistance to damage from flooding by allowing flood waters to pass through the structure," the owner is entitled to "[p]remium rates and coverage" on flood insurance, as well as "technical assistance and counseling." 42 U.S.C. § 4022(a)(2)(B). An expansive definition of "flood waters," such as one that includes irrigation waters in an irrigation canal, presumably would greatly expand the scope of this flood insurance program. Another federal statute authorizes federal assistance for damage caused by "flood waters" near the U.S./Mexican border, which on an expansive view would have to include waters even after they have been diverted to other purposes. 22 U.S.C. § 277d-12. Moreover, federal law also requires that mining operations be protected against the incursion of "flood water," a provision that under an expansive definition presumably mandates protection from leaking irrigation canals. 30 U.S.C. § 877(f). It is hard to take seriously the suggestion that Congress intended such results.

## II. The Relationship Of The Waters In This Case To Flood Control Is Too Attenuated To Justify Application Of Section 702c

Under whatever formulation is ultimately adopted as the test for Section 702c immunity, the judgment in this case should be reversed. Even on the reading most charitable to Respondent, there cannot be any real dispute that a large proportion of the water that has damaged Petitioner's farm has no relationship to flood control at all. In summer months, Friant Dam does not impound any "flood waters" because there is absolutely no risk at all that the San Joaquin River will flood.

Indeed, for many months of the year, portions of the river bed of the San Joaquin River below Friant are *totally dry*. In other months, only a proportion (generally an extremely small proportion) of the waters stored behind the Dam could otherwise possibly have constituted a "flood"; a still much smaller proportion of the contents of the Madera Canal could include those waters, as opposed to waters impounded in Millerton Lake simply to store an irrigation supply. Furthermore, waters only ever fill Millerton Lake to near capacity because they are being stored by Respondent for irrigation, *not* because they must be retained to regularize the flow of the river. See generally *infra* at 25-26. But the Ninth Circuit's judgment in this case nonetheless rests on the insupportable assumption that *all* the waters that have damaged Petitioner are "flood waters."

There are, moreover, three "bright line" distinctions between the water that damaged Petitioner's farm and any "flood waters" behind Friant Dam that, as we discuss *infra*, establish that *none* of the waters in this case are sufficiently related to flood control activities to warrant the application of Section 702c. First, a federal statute and implementing regulation and water control agreement expressly distinguish between "flood control" releases of water and releases for irrigation. Second, the water at issue in this case was diverted from the Dam into a separate facility (the Canal) and for a distinct purpose other than flood control (irrigation). Third, the government recoups the expenses it incurs for the waters in question through charges to irrigation users. It therefore is not surprising that Congress and federal agencies consistently describes the Canal's contents as "irrigation water," rather than "flood waters."

Thus, because the waters that damaged Petitioner have at most an extremely attenuated relationship to federal flood control efforts, Respondent's assertion of immunity should be rejected on any fair reading of the term "flood waters." But, to the extent doubts exist, the appropriate course is to remand

the case for further factual development, given that Petitioner's complaint was dismissed on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The allegation of Petitioner's complaint that the Madera Canal "is used to convey irrigation water" directly contradicts the government's assertion that the Canal is a "flood control project" carrying "flood waters." *Postal Tel. Cable Co.* v. *City of Newport*, 247 U.S. 464, 473 (1918) ("Since the case proceeded to judgment on the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true."); see also *National Metro. Bank* v. *United States*, 323 U.S. 454, 457 (1945); *Beal* v. *Missouri Pac. R.R. Co.*, 312 U.S. 45, 51 (1941); *Wilson* v. *North Carolina*, 169 U.S. 586, 594 (1898). Even if the complaint were not literally inconsistent with Respondent's factual assertions, a motion for judgment on the pleadings is resolved under the same standard as a motion to dismiss, and the complaint therefore must be "construe[d] in favor of the complaining party." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) (citing *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-22 (1969)); see also *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (dismissal is not permitted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). To accord weight to any factual assertions by Respondent regarding the supposed flood control functions served by the Canal would require this Court to do precisely the opposite.

### A. The Federal Statute, Regulation, And Water Agreement Governing "Flood Control" Activities At Friant Dam

Pursuant to the Flood Control Act of 1944, the Army Corps of Engineers has adopted regulations that govern the "use of storage allocated for flood control" on federally owned and operated reservoirs. 33 U.S.C. § 709; 33 C.F.R. § 208.11. As required by the regulation, the Corps has entered into a "water control agreement" with the Bureau of

Reclamation, which administers Friant Dam, governing the Dam's flood control operation. See Department of the Army, Report on Reservoir Regulation for Flood Control, Friant Dam and Millerton Lake – San Joaquin River, California (rev. ed. Aug. 1980) (hereinafter, "Friant Dam Agreement"). In two respects, the regulation and agreement establish that Petitioner was not damaged by "flood waters."

First, the agreement establishes that a substantial proportion of the water that damaged Petitioner's farm has no relationship to flood control whatsoever. In particular, in the summer months when irrigation demand is the highest and water flows in the Madera Canal are the greatest, Friant Dam has no space reserved for flood control and performs no flood control releases. See Friant Dam Agreement, Chart A-11 ("flood control releases are not required"). That is not surprising: in those months, the inflows of the San Joaquin River to Millerton Lake are low, which is precisely why the Dam was created in order to impound water for irrigation. The Ninth Circuit's judgment that Petitioner cannot recover for any of the damages it has incurred (including damages caused by waters leaking from the Canal in these summer months) is therefore insupportable on any reading of Section 702c.

Second, the agreement establishes that in the limited instances in which Friant Dam *is* operated for flood control, water is released only into the river bed, not the Madera Canal. The regulation expressly distinguishes between flood control releases and "other requirements" of dams, including diversions of water for irrigation. 33 C.F.R. § 208.11(c)(5). The agreement governing Friant Dam, in turn, distinguishes "conservation operation" from "flood control operation requirements." Friant Dam Agreement at 14, A-1. In the months when "rainflood space" is set aside in Friant Dam (October to March), any water that enters that space is required to be immediately released into the river bed, *not* into the Canal. See *id.* at Chart A-11. In other months, no space

is reserved for flood control.[7] So-called "conditional space" is reserved from February to July in order to fill the reservoir by the summer months when irrigation demand is at its highest. *Id.* at A-2, Chart A-11. Even nominal "flood control" releases are conducted in this period only in order to calibrate the impoundment of the river's normal flow to meet future irrigation demand (*i.e.*, to ensure that the Dam reaches its capacity at the end of the spring) and, once again, those "flood control" releases are made only into the river bed rather than the Canal. For this reason, the Bureau of Reclamation has confirmed that Friant Dam is used for flood control only "consistent with its operations for other functions." U.S. Dep't of Interior, Bureau of Reclamation, Intermittent Surface Water Supply, Total Water Management Study for the Central Valley Basin California, Working Doc. No. 6, at 13 (1975).[8]

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[7] Nor is there any doubt at all that the waters behind the Friant Dam are segregated as distinct "irrigation waters." The Solicitor General has argued emphatically in a case involving parallel regulations under the Flood Control Act of 1944 that "flood waters" subsequently stored behind a flood control dam for purposes of irrigation are distinctly identifiable as "unutilized irrigation waters." Br. of U.S., No. 86-939, *ETSI Pipeline Project* v. *Missouri* 16, 21, 22, 44; see also *id.* at 20, 32, 37 ("irrigation water"), 21 ("water stored but not needed for irrigation"), 22 ("water intended but not presently needed for irrigation purposes"), 25, 47 ("water stored for irrigation"). As the Solicitor General explained, "the Secretary [of Interior] defines the irrigation storage needs [and] determines the proper disposition of the resulting impounded water." *Id.* at 33.

[8] Even prior to its construction, studies established that any "flood control value of Friant reservoir could be obtained with very little, if any, impairment of its usefulness for supplying water for irrigation." State of California, Department of Public Words, Brief to the Division Engineer Regarding Report on Sacramento, San Joaquin and Kern Rivers, California 186 (Aug. 27, 1932). That is so because the greatest water volumes at the Dam "come from the melting of snow in the high mountains during the late spring and

B. Diversion Of Water Into A Separate "Irrigation Facility" Carrying "Irrigation Waters"

Extending Section 702c to encompass waters diverted into Madera Canal also would conflict with this Court's holding in *James* that "flood waters" are those "carried in a flood control project," 478 U.S. at 605 (emphasis added); see also *infra* part III (explaining that Ninth Circuit's judgment conflicts with *James* because Friant Dam is a "reclamation project" not a "flood control project"). The panel below recognized that the Madera Canal "is not a flood control project," Cert. App. 9a, but held that immunity applies under settled Ninth Circuit precedent because the Canal is nominally part of the CVP, which has "flood control" as one of its authorized purposes. That analysis is seriously flawed: Congress specifically included "flood control" in the authorized purposes of the CVP's "dam[s] and reservoirs" *but not its irrigation canals*. Rivers and Harbors Act of 1937, § 2, 50 Stat. 844, 850 (1937). Congress also expressly distinguished between the "Friant Reservoir" and the "irrigation facilities therefrom" in funding their construction. Emergency Relief Appropriation Act of 1936 (title II of the First Deficiency Appropriation Act, Fiscal Year 1936), Pub. L. No. 739, 74th Cong., 2d Sess., 49 Stat. 1597, 1608 (1936). In later years, the Department of Interior continued to advise Congress on the status of the Canal, and Congress continued to regard the Canal as a separate irrigation facility. Statement of Kenneth W. Markwell, Assistant Commissioner of Reclamation, Hearings on H.R. 4805, 79th Cong., 1st Sess. (1946), *reprinted in* 2 Central Valley Project Documents 20-21 (1957) (describing

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early summer. These flows are relatively predictable from measurement of the mountain snow pack, so that it is possible to allow the reservoir to fill nearly to capacity at the beginning of the irrigation season, with little danger that serious floods will spill over the dam, thus minimizing the conflict between flood control and irrigation use of the reservoir." Assembly of the State of California, Central Valley Project: Federal or State? 45-46 (1955).

Madera Canal separately as one of "the irrigation features" of the CVP, on which construction continued during World War II); Hearings on H.R. 7786, 81st Cong., 2d Sess. (1951), *reprinted in* 2 Central Valley Project Documents 34 (1957) (listing Madera Canal as one of several "Irrigation facilities"); see also U.S. Dep't of Ag., Bureau of Agricultural Economics, History of Legislation and Policy Formation of the Central Valley Project 235 (1946) (explaining that, in addressing the allocation of costs for the CVP, Congress in the Flood Control Act of 1944 expressly distinguished between dams and reservoirs that serve flood control purposes and "irrigation works" that are "necessary for irrigation purposes") (hereinafter "U.S. Dep't of Ag., CVP History").

Other sources similarly confirm that the exclusive function of the Madera Canal ever since its first operation in 1944 has been to provide water "for delivery to irrigation customers in the San Joaquin Valley." Comptroller General of the United States, Audit Report to the Congress of the United States: Central Valley, Folsom Reservoir, Kings River and Isabella Reservoir Projects in the Central Valley Basin, California 17 (1956) (hereinafter "Comptroller General, Audit Report"); see also FERC, San Joaquin Report at 30 ("The Madera Canal carries water from Millerton Lake northerly to irrigate land in Madera County."); Robert de Roos, The Thirsty Land: The Story of the Central Valley Project 8 (1948) ("The short Madera Canal wanders north from Friant to provide surface water for irrigation and restore underground water supplies between the San Joaquin and the Chowchilla River.").

The history of the Madera Canal further confirms that it is a separate irrigation facility. Citizens of the Madera region conceived of the Canal more than a century ago as a means to irrigate their crops by diverting water from the San Joaquin

River. After a number of failed attempts by local residents,[9] the federal government agreed to take over the project to create the southern hub of the CVP. Specifically, the federal government planned to build the Friant Dam to create a reservoir to store water for use in dry months and to divert the flow of the San Joaquin through the Friant-Kern Canal more than 150 miles south. Water that otherwise would have flowed in the San Joaquin's riverbed would be replaced with water diverted from the Sacramento River. The District agreed to sell the federal government the Friant site, the gravel supply, and its rights to riparian waters on the San Joaquin. In exchange, the federal government agreed to construct the Madera Canal, which would not be used to transfer water south but instead would run north from Millerton Lake for approximately 40 miles, and to provide the District with a guaranteed supply of irrigation water through the Canal.

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[9] In 1875, a civil engineer proposed creating a diversion canal at Friant, near Fresno, but the plan was not pursued. Gene Rose, San Joaquin: A River Betrayed 45-50 (1992). The Madera Irrigation District ("District") subsequently was constituted in 1888 and, although that effort failed and the District collapsed, a local "irrigation committee" later raised $25,000 to study building a dam at Friant to divert water for irrigation. Charles W. Clough, Madera: The Rich, Colorful and Exciting Historical Heritage of that Area Now Known as Madera County, California 38 (1968). Residents sought rights to water at the site from the State, and the District reconstituted itself to build the project in 1920, purchasing the land and a gravel supply, and securing a $28,000,000 bond in 1921. *Id.* Unfortunately, the District's plans to build the Dam and an irrigation canal collapsed again in 1931 (this time as a result of litigation). *Id.* Contemporaneous accounts reflect that the District represented "a real community effort to better the economic situation in the last large remaining area in the San Joaquin Valley for which a water supply could be made available from nearby sources, but of which a relatively small area was being irrigated." California Dep't of Public Works, Irrigation Districts in California, Bulletin No. 21, at 199 (1928).

Charles W. Clough, Madera: The Rich, Colorful and Exciting Historical Heritage of that Area Now Known as Madera County, California 38 (1968) (hereinafter "Clough, Madera History"). Thus, from its very inception, the Canal has operated exclusively for the purpose of irrigation.

Given that the United States both distinguishes "flood control" releases at Friant Dam from releases for irrigation and also regards the Madera Canal as a distinct "irrigation facility," it is no surprise that the government has consistently described the water in the Canal as "*irrigation water*" rather than "flood water." Respondent's consistent description of the waters in question thus confirms Petitioner's commonsense understanding that "flood waters" must change their character when held and diverted primarily for purposes other than flood control. See *supra* at 20. For example, the Secretary of Interior's initial report to the President recommending approval of funding for the CVP explained that the Madera Canal "will be capable of furnishing *irrigation water* to an area of 140,000 acres." Letter from Harold L. Ickes to President Roosevelt (Nov. 1935), *reprinted in* 1 Central Valley Project Documents: Authorizing Documents 565 (1956) (emphasis added). The Department of Interior's 1945 "Comprehensive Plan" for water development is to the same effect. U.S. Dep't of Interior, Bureau of Reclamation, Comprehensive Plan for Water Resources Development 174 (1945) ("Madera Canal diverts northerly from Millerton Lake to furnish a supplemental and new irrigation supply to lands in Madera Irrigation District. * * * It is in partial operation, furnishing *irrigation water* through existing canals and natural channels and by replenishing ground-water supplies." (emphasis added)). And the Department of the Interior subsequently advised Congress that as of 1949 the Canal was "in partial operation, furnishing *irrigation water* through existing canals and natural channels and by replenishing ground-water supplies." U.S. Dep't of Interior, Central Valley Basin, Our Rivers: Total Use for Greater Wealth, Sen. Doc. No. 113, 81st Cong., 1st Sess. 214 (1949) (emphasis added); see also U.S.

Dep't of Interior, Bureau of Reclamation, Central Valley Project: 1950 Annual Report 11 (1950) ("This important unit of the Central Valley Project delivers 1,000 cubic feet of water per second to its service area in Madera County, and during 1950 alone, delivered more than 116,000 acre-feet of *irrigation water*." (emphasis added)).

C. Recoupment Of Costs For Irrigation

Holding that the "irrigation water" at issue in this case constituted "flood waters" would also be contrary to Congress' intent in enacting Section 702c. This Court confirmed in *James* that Congress' rationale in immunizing the government for damage "from or by floods or flood waters" was ensuring that the expenditures required for the plan's flood control efforts, which the federal government would not recoup, would not also thereby expose the government to further liability. 478 U.S. at 607. Applied to the Friant Dam, that rationale makes sense, if at all, only with respect to flood control releases into the river bed, for which the federal government does not recoup its costs.

By contrast, the construction and operation of the Dam and Canal for the purpose of irrigation do not implicate Congress' intent in enacting the immunity provision because the government recoups the costs of such activities through charges to irrigation users. Respondent provides the water in the Madera Canal to irrigation users pursuant to a binding contractual arrangement under which users of the water reimburse the government for its costs. E.g., Br. of U.S., No. 86-939, *ETSI Pipeline Project* v. *Missouri* 7 n.9 ("As in any Bureau reclamation project, irrigators and power users would be expected to repay the project costs assignable to irrigation and power production."); see also *id.* at 43 ("Thus, irrigators are required to repay that portion of * * * construction costs allocable to irrigation, including the cost of providing irrigation storage and the cost of providing power for irrigation, that is within their power to repay."). The federal government's cost allocation methodology mandates that "[s]eparable costs of

multiple-purpose units are computed to the extent that it is reasonable to do so and that reliable data are available; they are then deducted from total project cost in order to arrive at joint costs which must be allocated by other means." Assembly of the State of California, Central Valley Project: Federal or State? 79 (1955). For the Friant division, "the Friant-Kern and Madera Canals are used only for irrigation, and are accordingly charged to irrigation costs." *Id.* As a result, to hold that Respondent is immune in this case would only serve to require Petitioner to subsidize the provision of water to the irrigators that use the Canal. Nothing suggests that Congress contemplated such a remarkable result.

Of note, Congress clearly distinguished construction under the Flood Control Act from reclamation developments such as the Madera Canal that would distribute irrigation waters. To nonetheless hold that the government is immune for reclamation activities flies directly in the face of congressional intent. The Act's supporters thus expressed the view that "reclamation" which resulted from the flood control projects created under the Act would be "*purely incidental*." 69 Cong. Rec. 8193 (May 9, 1928) (statement of Sen. George) (emphasis added); see also *id.* ("*Wholly incidental* is the benefit that flows to landowners and property owners along the Mississippi." (emphasis added)). Proponents were emphatic that "there is no similarity between flood control and reclamation. The very opposite obtains. The dissimilarity suggests a contrast rather than a comparison." 69 Cong. Rec. 6652 (Apr. 17, 1928) (statement of Rep. Whittington); see also *id.* at 8193 (May 9, 1928) (statement of Sen. George) ("I do not regard flood control on the Mississippi River as standing upon the same basis or being in anywise analogous to reclamation. The two seem to me to be wholly apart."); H.R. Rep. No. 300, 63 Cong., 2d Sess., pt. II, at 70, *quoted in* H.R. Rep No. 1072, 70th Cong., 1st Sess. 158 (1928) (explaining that the Act was "not a question of reclamation; that is to say, the advocates of Federal control of these floods are not asking that Congress appropriate any money for the rec-

lamation of these overflowed lands. * * * It is a mistake, then, to assume that Congress is being asked to engage in any reclamation work.").

## III. Petitioner Was Not Damaged By Water Carried In A "Flood Control Project"

The judgment below should also be reversed because, although the Ninth Circuit correctly recognized that *James* limits Section 702c to waters carried in a "flood control project," it erred in holding that the waters in this case satisfied that standard. The court of appeals' holding rests on two premises, both of which conflict with this Court's decision in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), and either of which justifies reversal. First, the Ninth Circuit held that Central Valley Project is a "flood control project" because its authorized purposes include flood control. Second, the court of appeals held that every component of the CVP, including Friant Dam, is by definition also a "flood control project." In reality, notwithstanding its incidental operation for flood control, the Friant Dam is a "reclamation project" separate and distinct from other components of the CVP that are "flood control projects." The water impounded by the Dam thus is not subject to Section 702c.

### A. "Flood Control" Projects Are Distinct From "Reclamation Projects" For Purposes Of Section 702c

The Ninth Circuit assumed, without explanation, that every facility which is part of a larger project that, in turn, includes "flood control" in its authorized purposes is itself a "flood control project" for purposes of the Flood Control Act. In reality, since the late 1800s, Congress has employed the phrase "flood control project" in various Flood Control Acts (including the 1928 Act at issue here) as a term of art referring to facilities constructed and operated by the Army Corps of Engineers for the principal purpose of "flood control." E.g., Water Resources Development Act of 1999, 106 Pub. L.

53, 113 Stat. 269 (1999) (listing numerous "flood control projects"). "Flood control projects" are thus distinct from "irrigation" and "reclamation" projects. For example, the Chapter of the U.S. Code relating to reclamation and irrigation (Title 43, Chapter 12) instructs federal agencies to cooperate with state and local governments regarding water projects, distinguishing between "Federal navigation, flood control, irrigation, or multiple purpose projects." 43 U.S.C. § 390b(b). Indeed, the statute contemplates that although *any* of those types of projects may include "reservoir projects," and even costs "allocated to flood control," *id.* § 485h(b), each project is not thereby converted into a "flood control project." Congress has also authorized funding for the repair "of any flood control work threatened or destroyed by flood," 33 U.S.C. § 701n(a)(1), which the Army Corps of Engineers construes to *exclude* "[s]tructures built primarily for the purpose of channel alignment, navigation, recreation, fish and wildlife enhancement, *land reclamation*, drainage, or erosion protection," 33 C.F.R. § 203.42(a) (emphasis added).[10]

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[10] See also, e.g., 7 U.S.C. § 1860(b) (restricting crop loans and farm payments regarding "contracts entered into with respect to Federal irrigation, drainage, or flood-control projects"); 15 U.S.C. § 205c(9)(C) (distinguishing measurements to be used with respect to "any Federal building or construction project * * * on or used in connection with river, harbor, flood control, reclamation, or power projects"); 16 U.S.C. § 3952(d) (requiring consistency "in implementing, maintaining, modifying, or rehabilitating navigation, flood control or irrigation projects" as they relate to Louisiana wetlands); 7 C.F.R. § 12.31(c) (excluding from the definition of "artificial wetlands" those "created in order to mitigate the loss of other wetlands as a result of irrigation, recreation, municipal water, flood control, or other similar projects"); 29 C.F.R. § 9.4(9)(b)(2)(iv) (excluding from executive order regarding "public buildings," buildings "[o]n or used in connection with river, harbor, flood control, reclamation, or power projects").

In particular, reclamation projects are constructed by the Bureau of Reclamation and are subject to a distinct legal regime under which the waters they divert may be used only on farms no larger than 160 acres, see generally *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958), and the costs of their irrigation and power features must be recouped through charges to users, see *supra* at 31-32. Flood control projects, by contrast, are constructed and generally administered by the Army Corps of Engineers and are not subject to such restrictions. "Under the water-service contracts the Bureau of Reclamation is a wholesaler of water. The Bureau constructs the facilities and contracts with a water users organization (or in some instances, individual water users) for delivery of water at rates which will probably repay the operation and maintenance costs, including replacements during the repayment period, and the share of the construction costs to be repaid by the water users." Comptroller General, Audit Report at 40. By contrast, "[i]n providing for flood control at a reservoir project of the Corps of Engineers, no direct assessment is made against the beneficiaries for the flood control operations." *Id.* at 37.

### B. The Decision Below Conflicts With This Court's Holding In *United States* v. *Gerlach Live Stock Co.* That The Friant Dam Is A Reclamation Project, Not A Flood Control Project

As we explained above, Congress embraced the distinction between reclamation projects and flood control projects in enacting the Flood Control Act. See *supra* at 32-33. In particular, Congress emphasized that projects constructed under the Act were wholly distinct from reclamation facilities. Friant Dam, however, *is* a reclamation project constructed and operated by the Bureau of Reclamation, as this Court squarely held in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), which involved the federal government's obligation to pay landowners downstream from the Friant Dam the value of their riparian rights to water impounded by the Dam. The

district court held that the Dam was a reclamation project and that the United States was therefore required to pay for the water rights under the terms of federal reclamation law. In this Court, the federal government sought to avoid paying on the basis of its "navigation servitude." But because the Dam impounded the San Joaquin and thereby *eliminated* navigation, the government was reduced to relying principally on the Dam's supposed relationship to flood control, which the government asserted bore a sufficient nexus to navigation.

The Solicitor General argued in *Gerlach* that the Dam was a flood control project because (i) "the Friant Dam was designed to prevent floods in the San Joaquin Valley," such that a certain portion of Millerton Lake's capacity was reserved for flood control and water was released into the river bed to keep the Lake from overflowing "at the expense of possible irrigation uses," and (ii) as a legal matter, "the fact that flood control is joined with other purposes does not strip the project of its flood control character." Br. for U.S., O.T. 1948, No. 4, *United States* v. *Gerlach Live Stock Co.* 36 (hereinafter, "*Gerlach* Opening Br."); Reply Br. for United States, *id.*, at 13 (hereinafter, "*Gerlach* Reply Br."). The Solicitor General also contended that Congress' authorization of the CVP for "flood control" properly was imputed to the Dam, maintaining that (i) the fact that the CVP's authorized purposes included flood control rendered the Dam a flood control project because "Congress established the Central Valley Project as an integral whole" and the district court therefore "should not have segregated what Congress quite properly treated as a unit," and (ii) Congress had stated expressly in one of the CVP's authorizing statutes that flood control took priority over other functions. *Gerlach* Opening Br. at 26; *Gerlach* Reply Br. at 13; see also *Gerlach* Opening Br. at 30 ("So here, the Friant Dam was not an isolated structure, but was an integral part of the entire Central Valley Project."), 34 ("Congress was amply justified in so treating the project as an entity, and hence, the court below was not warranted in isolating Friant Dam from the entire project.").

This Court rejected the Solicitor General's arguments and affirmed the district court's determination that Friant Dam is a "reclamation project," notwithstanding the Dam's limited flood control features and notwithstanding that other components of the CVP are "flood control projects." The Court did not doubt that in "a plan so comprehensive [as the CVP] * * * particular components may be described without pretense as * * * flood control projects," 339 U.S. at 736, but it squarely concluded that the Friant Dam is *not* such a project. Justice Jackson's opinion for the Court explained that President Roosevelt originally had authorized "funds for construction of Friant Dam and canals" "in accordance with the reclamation laws," and that the Secretary of Interior had made the required finding of feasibility for the project under the reclamation laws. *Id.* at 732. Congress, in turn, "reauthorized" the project as "already initiated by President Roosevelt," and expressly "provided that 'the provisions of the reclamation law'" would govern construction of, *inter alia*, "'dams'" and "'canals.'" *Id.* at 732-33. Congress specifically deferred to the view of the Bureau of Reclamation, which was charged with constructing and administering the CVP: "From the beginning, it has acted on the assumption that its Friant undertaking was a reclamation project. *Even a casual inspection of its committee hearings and reports leaves no doubt that Congress was familiar with and approved this interpretation*." *Id.* at 739-40 (emphasis added). The Court found its conclusion that the Dam was a reclamation project inescapable, given that the "project has been regarded by the highest Executive authorities as a reclamation project, and has been carried as such from its initiation to final payment * * * , and Congress, knowing its history, has given the approvals it has." *Id.* at 742.

This Court also rejected the argument that Congress, by broadly authorizing the CVP for flood control purposes, intended to convert each separate component of the CVP into a flood control project. Instead, "Congress' general direction of purpose we think was intended to help meet any objection to

its constitutional power to undertake this big bundle of big projects." *Id.* at 737-38. It was open to question at the time Congress authorized construction of the CVP whether the federal government had the power to create an intra-state reclamation project for the benefit of nonfederal lands. *Id.* at 732. Efforts to enhance "navigation" and "reduce floods," however, were within federal authority under settled precedents. *Id.* Thus, the broad statement of the CVP's purpose "was in justification of federal action on the whole, not for effect on private rights at every location along *each component project*." *Id.* at 738 (emphasis added).[11]

The Court in *Gerlach* finally took pains to reject the government's related argument that the CVP as a practical matter operates as an "integrated whole," such that its supposed flood control functions elsewhere in the Central Valley should be imputed to the Friant Dam:

> The Central Valley basin development envisions, in one sense, an integrated undertaking, but also an aggregate of many subsidiary projects, *each of which is of first magnitude*. It consists of thirty-eight major dams and reservoirs bordering the valley floor and scores of smaller ones in headwaters. It contemplates twenty-

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[11] See also Senate of the State of California, Feasibility of State Ownership and Operation of the Central Valley Project of California 101 (1952) (explaining that broad statement of purpose was necessitated by the holding of *United States* v. *Arizona*, 295 U.S. 174 (1935), that the Bureau of Reclamation's construction of Parker Dam had not been authorized by Congress, as well as "the further objection that the primary objective of federal reclamation law being to dispose of the public domain, its constitutional sanction rested on the property clause of the U.S. Constitution. In the [CVP] project service area, however, there were no public lands to reclaim."); U.S. Dep't of Ag., CVP History at 2 ("Some doubts had been raised as to the legality of a Federal reclamation project in an area irrigated from a wholly intra-state stream and in which there was no federal land."); *id.* at 82 (same).

> eight hydropower generating stations. It includes hundreds of miles of main canals, thousands of miles of laterals and drains, electric transmission and feeder lines and substations, and a vast network of structures for the control and use of water on two million acres of land already irrigated, three million acres of land to be newly irrigated, 360,000 acres in the delta needing protection from intrusions of salt water, and for municipal and miscellaneous purposes including cities, towns, duck clubs and game refuges. These projects are not only widely separated geographically, many of them physically independent in operation, but they are authorized in separate acts from year to year and are to be constructed at different times over a considerable span of years.

*Id.* at 733 (emphasis added); see also Congressional Budget Office, Water Use Conflicts in the West: Implications of Reforming the Bureau of Reclamation's Water Supply Policies 31 (1997) (explaining that because Friant Dam exclusively impounds the San Joaquin River and does not receive water transferred from the Sacramento River, it "is not directly linked to other CVP units").

It is not necessary to dwell on the obvious, total, and remarkable conflict between *Gerlach* and the Ninth Circuit's holding that Respondent is entitled to immunity because the CVP "has flood control as one of its congressionally authorized purposes" and operates as an "integrated whole." See *supra* at 3. The Solicitor General unsuccessfully made the identical arguments regarding the identical facility in *Gerlach*. *Gerlach*'s holding rejecting those arguments is in two respects fully applicable to the determination whether the federal government is entitled to immunity under the Flood Control Act. First, *Gerlach* settles conclusively that Congress, accepting the representations of the Department of Interior, regarded the Friant Dam as a reclamation project, *not* a flood control project. By contrast, in enacting the Flood

Control Act, Congress was concerned only with "flood control projects designed to carry floodwaters." *James*, 478 U.S. at 605. Particularly given that the Department of Interior sought funding for the Dam in the early 1930s, only a few years after the Flood Control Act was enacted, there simply is no basis to conclude that Congress conceived of it as a "flood control project."

Second, *Gerlach* settles that each component of the CVP, such as the Friant Dam or the Madera Canal, is a separate project with its own purposes. Different components of the CVP were constructed at different times, with different types of congressional authorizations, and for different purposes; the CVP thus is "an aggregate of many subsidiary projects, *each of which is of first magnitude*." 339 U.S. at 733 (emphasis added). In particular, the Court in *Gerlach* did not doubt that individual components of the CVP could be deemed "flood control projects," *id.* at 736 – Friant Dam simply was not one of them. See also Senate of the State of California, Feasibility of State Ownership and Operation of the Central Valley Project of California 102 (1952) ("It also appears evident from the [*Gerlach*] opinion that the designation 'reclamation project' applies not only to Friant Dam but to the entire project of which Friant Dam and related irrigation facilities is an integral part.").

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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